

(c) If the Army or a Federal Court finds that discrimination existed at the time the applicant was considered for employment, but also finds clear and convincing evidence that the applicant would not have been hired even without discrimination, the Army will consider the applicant for any existing vacancy of the type and grade for which he or she was considered initially and is qualified, before considering other candidates. If the applicant is not selected, the reasons for nonselection are recorded and made a part of the complaint file. If there is no vacancy, the Army gives the applicant priority consideration for the next vacancy for which he or she is qualified. This will take precedence over other priorities.

§ 588.53 Remedial action involving an employee.

Upon a finding of discrimination, the Army will take remedial actions that may include one or more of the following:

(a) *Retroactive promotion.* A retroactive promotion or assignment with back pay to the position denied the employee or an equivalent position may be provided as a remedy unless the record contains clear and convincing evidence that the employee would not have been promoted or employed at a higher grade even without discrimination. The back pay liability may not accrue from a date earlier than 2 years before the date the discrimination complaint was filed; however, in no case will the back pay liability accrue from a date before the earliest date the complainant could have been promoted.

(b) *Priority consideration.* A first consideration action (in connection with an initial hire, reassignment, or promotion) before other applicants or candidates are considered.

(c) *Cancellation.* Cancellation of an unwarranted personnel action and restoration of the employee.

(d) *Deletion.* The deletion from Army records of any reference to, or any record of, an unwarranted disciplinary action.

(e) *Participation.* Full opportunity to participate in the benefit denied complainant (for example, training or preferential work assignments).

§ 588.54 Award of attorney fees and/or costs.

(a) In complaints of discrimination, the Army or a Federal Court may award the applicant or employee who is represented by an attorney reasonable attorney fees and/or costs as a part of the remedial relief under this regulation. Except as provided in § 588.55, Army decisions will make such awards only when a finding or admission of discrimination is made. The award of attorney fees and/or costs is not available in administrative cases of discrimination based on age.

(b) Attorney fees are paid only for services performed after a formal complaint has been filed under this regulation and after the complainant has notified the Army that he or she is represented by an attorney. However, the attorney may be compensated for a reasonable amount of time spent to make the decision to represent the complainant. Written submissions to the Army that are signed by the attorney shall be deemed to constitute notice of representation. Attorney fees are allowable only for services of members of the bar and law clerks, paralegals, or law students supervised by members of the bar. No award will be made for the services of any employee of the Federal Government. Attorney fees and/or costs are paid by the activity where the discrimination took place. Requests for attorney fees and/or costs will include all of the following:

(1) A statement of the number of hours spent in preparing and presenting the case. This must specify the dates that work was done on the case and detail the work performed. It must also describe the training and experience of each person who worked on the case and the number of hours spent by each.

(2) A sworn statement of the attorney's usual and customary hourly charge, and the usual fee for each person who worked on the case.

(3) A sworn statement explaining all of the following:

(i) Whether the fee for the case was fixed or contingent.

(ii) Whether the handling of the case prevented other employment.

(iii) The nature and length of the professional relationship with the client.

Department of the Army, DoD

§ 588.54

(iv) Any other factors that might affect the amount of the award.

(4) Sworn statements by other attorneys or the local bar association in the relevant geographic area, who work in employment discrimination, setting forth all of the following:

(i) The customary fee for such work.

(ii) The desirability of the case.

(iii) Awards in similar cases.

(iv) The reputation, ability, and experience of the attorney requesting the fees.

(5) Other information in the form required by courts in the awarding of attorney fees and costs.

(c) The complainant and his or her representative, if any, files a verified statement of attorney fees and/or costs as described in b above with the activity EEO officer within 20 days of receipt of the decision. The EEO officer will immediately submit the request and supporting documents to the activity labor counselor for review and recommendation. The labor counselor will review and analyze in writing the request and supporting documents in accord with relevant judicial requirements and all the following:

(1) *Attorney fees.* (i) The time and labor required.

(ii) The novelty and difficulty of the questions.

(iii) The skill requisite to perform the legal service properly.

(iv) The preclusion of other employment by the attorney due to acceptance of the case.

(v) The customary fee.

(vi) Whether the fee is fixed or contingent.

(vii) Time limitations imposed by the client or the circumstances.

(viii) The amount involved and the results obtained.

(ix) The experience, reputation, and ability of the attorney.

(x) The undesirability of the case.

(xi) The nature and length of the professional relationship with the client.

(xii) Awards in similar cases.

(2) Costs (as authorized by section 1920, title 28, United States Code (28 U.S.C. 1920)).

(i) Fees of the reporter for all or any of the stenographic transcripts necessarily obtained for use in the case.

(ii) Fees and disbursements for printing and witnesses.

(iii) Fees for exemplification and copies of papers necessarily obtained for use in the case.

(iv) Witness fees will be awarded in accord with the provisions of 28 U.S.C. 1821, except that no award will be made for a Federal employee who is in a duty status when made available as a witness.

(d) If the complaint is resolved at the activity, with a finding of discrimination, the Activity Commander or his or her designee, in consultation with the EEO officer and the labor counselor, is authorized to award attorney fees and/or costs provided agreement is reached on the amount of fees and/or costs and the amount is less than \$5,000. In cases where agreement cannot be reached, or where the amount is \$5,000 or more, the final award will be made by the Secretary of the Army or his or her designee. If the parties agree that attorney fees should not be awarded, the settlement agreement should include an explicit waiver of the complainant's right to seek fees.

(e) If the activity cannot reach a settlement on the fees and/or costs or the amount requested is \$5,000 or more, the activity labor counselor will review the amount claimed and make a recommendation. This recommendation will be sent through the Labor and Civilian Personnel Law Office, Office of the Judge Advocate General, ATTN: DAJA-LC, WASH 20310-2209, for final decision by the Secretary of the Army or his or her designee as follows:

(1) If agreement is not reached at the activity within 20 calendar days after receiving the verified statement, upon receipt of the labor counselor's recommendations, the Secretary of the Army or his or her designee will issue a written final Army decision to the complainant on the amount of fees and/or costs.

(2) The decision should be issued within 30 calendar days after receipt of the verified statement.

(3) The decision will give specific reasons for the amount of the award and state the complainant's right to appeal the decision to EEOC or file a civil action in a Federal District Court.

(f) If the complaint of discrimination is resolved on the merits by a decision of the Secretary of the Army or his or her designee, the award of attorney fees and/or costs must also be made by the Secretary of the Army or his or her designee in accord with the procedures outlined in (e) above.

(g) All payment of attorney fees and/or costs will be made payable jointly to the complainant and the attorney of record.

§ 588.55 Informal no-fault settlement.

(a) Informal settlements of complaints may be reached though the Army need not admit fault, wrongdoing, or discrimination provided that the ROI indicates some merit to the allegation of wrongful action.

(b) The standard for informal settlement awards is stated in § 588.51.

(c) The Activity Commander, or his or her designee, in consultation with the EEO officer and the labor counselor, has authority to award attorney fees and/or costs as part of an informal settlement if agreement is reached between the parties and the amount to be awarded is less than \$5,000. If the parties do not reach agreement, or the amount is \$5,000 or more, the final award will be made by the Secretary of the Army or his or her designee.

Subpart F—Appeals and Civil Actions

§ 588.57 Appealing an Army decision.

(a) A complainant in an individual complaint of discrimination or a class agent in a class complaint may appeal to the EEOC Office of Review and Appeals, 2401 E Street, NW, WASH DC 20507, the Army decision—

(1) To reject or cancel the complaint in whole or in part.

(2) To refuse to reinstate the complaint for further processing.

(3) On the merits of the complaint, the issue of attorney fees and/or costs, or the remedial action.

(b) A claimant in a class complaint may appeal to the EEOC Office of Review and Appeals, 2401 E Street, NW, WASH DC 20507, the Army decision—

(1) To cancel or reject a claim for individual relief.

(2) On the merits of the claim for individual relief or the issue of attorney fees and/or costs.

(c) Except as provided in § 588.57(f) complainant in an individual complaint of discrimination may file a notice of appeal with the EEOC any time after receiving the Army Notice of Final Decision on his or her complaint but not later than 20 calendar days after receiving the decision. A notice of appeal will be deemed filed on the date it is postmarked or, without a postmark, on the date it is received by the EEOC. Any statement or brief to support the appeal must be sent to the EEOC and to EEOCCRA, ATTN: SFCR, WASH DC 20310-1813, within 30 calendar days after the date the notice of appeal was filed.

(d) On receiving the complainant's statement or brief, EEOCCRA will ask the activity to send management comments and copies of the case file. These comments must be coordinated between the activity EEO officer, labor counselor, and CPO, and must be received by EEOCCRA early enough for EEOCCRA to meet the EEOC suspense date. Comments will be prepared in a format that will permit forwarding to EEOC without editing or retyping.

(e) Except as in § 588.57(f) an agent or a claimant in a class complaint may file an appeal at any time after receiving a final Army decision, but not later than 15 calendar days after receiving the decision. An appeal will be deemed filed on the date it is postmarked or, without a postmark, on the date it is received by the EEOC.

(f) Usually, the time limits for filing a notice of appeal will not be extended by the EEOC. However, the EEOC, at its discretion, may extend the time limits and accept an appeal based on a written statement by the complainant. The statement must show that the complainant was not notified and not otherwise aware of the prescribed time limits, or that circumstances beyond his or her control prevented filing a notice of appeal or an appeal within the prescribed time limits.

(g) The EEOC Office of Review and Appeals reviews the complaint file and all relevant written representations made by the parties. The office may return the complaint to the Army for